



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of an Application by Chuck Bye for
Reconsideration of an After-the-Fact Water
Quality Certification to Place Fill Affecting 0.0848
Acres of Wetland for the Purpose of Providing
Drivable Access to Upland Sites on Property
Located in the Town of Harding, Lincoln County

Case No. IP-NO-2008-35-70931

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice, hearing was held at Merrill, Wisconsin on June 27, 2011,
Jeffrey D. Boldt, administrative law judge presiding.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this
proceeding are certified as follows:

Chuck Bye,
P. O. Box 167
River Falls, WI 54022

Wisconsin Department of Natural Resources, by

Attorney Edwina Kavanaugh
Attorney Megan Correll
Department of Natural Resources
P. O. Box 7921
Madison, WI 53707-7921

FINDINGS OF FACT

1. Chuck Bye, P. O. Box 167, River Falls, Wisconsin, 54022, filed an after-the-fact application with the Department of Natural Resources for water quality certification pursuant to Section 401 of the Federal Clean Water Act and Wis. Admin. Code §§ NR 299 and NR 103.

2. The proposed project is located in the N ½ of Section 10, T32N, R5E, in the Town of Harding, Lincoln County. The proposed project would affect 0.0848 acres of wetlands for the purpose of providing tractor and mower access by way of “a crossing to 55 acres” of property for “mowing and recreational use,” primarily grouse hunting, located in the Town of Harding, Lincoln County. (Ex. 20) The crossing is approximately 231 feet long and 16 feet wide. (Ex. 3-B)

3. The Department of Natural Resources denied the after-the-fact application for Water Quality Certification as outlined in a letter to Chuck Bye dated May 17, 2010. On June 1, 2010, Attorney Tracy N. Tool, on behalf of Chuck Bye, filed a request for a contested case hearing. By letters dated June 24, 2010 and June 29, 2010, the Department granted a contested case hearing pursuant to Wis. Stat. § 227.42 and Wis. Admin. Code NR 299.05. On February 28, 2011, the Department filed a Request for Hearing with the Division of Hearings and Appeals.

4. This is a “federal jurisdiction wetland” because it is connected or adjacent to a navigable water of the United States. The proposed wetland fill area is part of a larger wetland complex which is connected to and which drains to the New Wood River by way of surface water connection. (Grafelamn; Houston) Historical aerial photos establish that the wetland at the project site is periodically flooded and connected by an intermittent stream to the New Wood River. (Houston)

5. The proposed project purpose is to allow a crossing for “mowing and recreational” hunting trails. (Ex.20) The applicant enjoys grouse hunting and testified that he is sixty-seven years old and finding it more difficult to access certain areas of his property on foot. The mowed trails assist him in pursuing his passion of hunting grouse. Filling a wetland for the purpose of mowing trails to facilitate grouse hunting is not a “wetland dependent activity” within the regulatory framework. (Grafelman)

6. Multiple DNR experts testified that the site is among the highest quality sedge meadow wetlands remaining in the state of Wisconsin. Wisconsin has no more than three percent of its historical stock of sedge meadow wetland. (Weide; Ex. DNR 43) The project site is rated as having “exceptional” wetland functional value for floral diversity, water quality, shoreline, and groundwater protection, as well as for aesthetics, recreation and education. It was also rated as “high” for wildlife habitat. (Ex. DNR 16)

7. The parcel that includes the proposed fill area at issue was purchased on May 16, 2005. The applicant knew this property was a wetland area prior to this purchase. There are no buildings or other improvements which require easy drive-able access and there is no dispute in the record that foot access is available for recreational hunting as the property was configured before the filling undertaken by Mr. Bye. Rather, the mowed trails are a personal luxury and convenience preferred by the applicant because of his advancing age. However, Mr. Bye and/or his successors can continue to gain access by foot across the proposed fill area without need of the fill and the domestic luxury of a mowed trail for hunting wildlife. Many hunters make use of hip waders or even chest waders to cross wet areas.

Further, the Department provided testimony that, despite the expense, an elevated boardwalk or bridge would be a reasonable alternative to accomplish the project goal of maintaining groomed hunting trails. (Grafelman; Exs. 31-33) The parties disputed the costs of such a plan. Mr. Bye estimated it at \$198,000, while Mr. Grafelman testified that he knew of several local projects that were undertaken for the same reason at considerably less expense. (Exs. 31-33) Grafelman estimated the cost of an elevated bridge at the project site to be between \$85,000 and \$100,000.

Another reasonable alternative discussed by Mr. Grafelman was the possibility of temporary construction of a winter ice crossing over the wetland area. This is a common practice utilized by many loggers in the north woods. Given that much of grouse season is during the winter months, this option would be compatible with the project purpose. Mr. Grafelman also laid out a viable road access route to the 55 acres that is admittedly somewhat circuitous. (See: Ex. DNR 29-B)

A preponderance of the evidence indicates that there are numerous practicable alternatives to the proposed wetland fill. (Grafelman)

8. The project would have a significant detrimental direct impact upon preserving the wetland functional value of providing wildlife habitat. Sedge meadow makes excellent wildlife habitat for numerous species because of its versatility and variability. Sometimes the area is inundated with water and other times not. (Weide) The fill area would create an artificial barrier for the migration of frogs, turtles and other amphibians including the Blanding's turtle. (Grafelman) Blanding's turtles (*Emydoidea blandingii*) are listed as a Threatened species in Wisconsin. (Id.) Further, several bird species with the "greatest conservation need" are significantly associated with northern sedge meadow habitat. (Weide; Ex. 44, p.9)

9. In addition to the direct impacts within the footprint of the fill area, the project would have secondary detrimental impacts to a larger area of the wetland due to likely changes in hydrology around the project site. The Department estimated the secondary impact area to be a total of 1.553 acres. (DNR Ex.47) Detrimental impacts to flood storage values would likely result from secondary impacts resulting in a change of hydrological patterns. Further, the cumulative impact would be detrimental to wildlife values and flood storage remaining sedge meadow wetland areas if other small driveway projects were approved, resulting in similar direct and secondary detrimental impacts to exceptional quality wetlands. (Grafelman, Weide) There is evidence that there is often increased predation associated with the use of culverts. Predators hang around culverts and make easy prey of slow moving species that make use of culverts. (Weide)

10. DNR Fisheries Biologist David Seibel testified that Northern Pike seek out intermittent sedge marshes such as the proposed project area for spawning. The species especially likes sedge meadow wetlands due to the presence of fine grasses, as is documented in Becker's Fishes of Wisconsin. (Id., Ex. DNR 46) Seibel provided

undisputed expert testimony that fill in this area would have a direct detrimental impact upon fishery values due to a net loss of a likely prime northern pike spawning area. This includes numerous other fish species that likely use this wetland area (when flooded) for spawning habitat. (Ex. 33) Mr. Bye stated his emphatic lay opinion that he had never seen northern pike in the area, even when flooded, and that he did not believe the area could ever serve as spawning habitat for any fish species. However, Seibel testified there was an intermittent stream that flows to the New Wood River and the Department provided aerial photos documenting the ongoing but intermittent nature of a stream connecting the wetland to the New Wood River. Further, as noted below, Mr. Bye has only owned the property for six years. Seibel's expert testimony is more credible and must be given greater weight than that of the applicant.

11. The proposed project has been evaluated under the Wisconsin Environmental Policy Act (WEPA), and it has determined that the grant or denial of the permit would not be a major state action under WEPA. (DNR Ex.33)

DISCUSSION

Mr. Bye admitted in his closing that he had provided no expert testimony to carry his burden of proof in this matter. Rather, he argued strenuously that there was no practicable alternative location other than the proposed wetland-fill area to allow him mowed access over the wetland to "tie into his existing trail." However, this is a too narrow interpretation of his legal obligation to explore alternatives to the wetland fill.

Numerous courts have held that this obligation includes buying other properties at sites available at the time of market entry, making arrangements for easements on neighboring properties and other significant efforts to avoid impacts to wetlands. (See: R. K. Rusinko, *Bersani v. EPA: Wetlands Protection - The EPA Veto Power under the Clean Water Act*, 7 Pace Envtl. L. Rev. 375, 1990; *The Steepest Hurdle in Obtaining A Clean Water Act Section 404 Permit: Complying with EPA's 404 (b)(1) Guidelines' Least Environmentally Damaging*, J Schutz - UCLA Journal of Environmental Law and Policy, 2006)

In the context of the significant legal obligation to explore alternatives, the Department provided testimony that, despite the expense, an elevated boardwalk or bridge would be a reasonable alternative to accomplish the project goal of maintaining groomed hunting trails. (Grafelman; Exs. 31-33) Similarly, the option of a winter ice road crossing, or returning to foot access, while not optimal, represent reasonable alternatives to the wetland fill. Most recreational hunters in Wisconsin do not need or expect golf course style mowed-fairways for the hunting of wildlife.

Although he offered no specific new plan, Mr. Bye did orally offer at hearing to put in additional culverts to minimize the impacts on water hydrology, and to reduce the footprint of the fill by several feet on both sides and to lower the elevation of the fill material. (See: Ex. 1-B) The Division of Hearings and Appeals adjourned the hearing for some time to give the parties an opportunity to discuss the new oral plans of Mr. Bye.

However, the parties were unable to resolve their differences. No specific new plan was submitted to the Division for consideration at hearing.

Based upon the record made at hearing, this case is not difficult to decide because there was a large and compelling preponderance of undisputed expert testimony which supported the Department's determination to deny water quality certification for filling this "exceptional" quality wetland. Further, the proposed project purpose of grooming and mowing hunting trails does not provide a compelling rationale for approval of the water quality certification, particularly in light of the numerous practicable alternatives to such a fill.

The Department's determination to deny water quality certification must be affirmed under these circumstances.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under Wis. Stat. §§ 227.43(1)(b) and Wis. Admin. Code NR 299 to hear contested cases and issue necessary Orders relating to wetland water quality certification.

2. The instant hearing is a de novo hearing on the issue of whether the department should grant, grant with conditions, deny or waive water quality certification pursuant to Wis. Admin. Code NR 299.05(6). The project proponent bears the burden of demonstrating compliance with water quality standards.

2. The parties stipulated that the subject parcel is a "wetland" area where water is at, near or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which has soils indicative of wet conditions. NR 103.02(5)

3. Placement of the fill would not conform to the standards for water quality certification for filling a wetland under Wis. Admin. Code NR 103.08(3)(b) because practicable alternatives to such a fill exist which will avoid and minimize adverse impacts to wetlands and will not result in other significant adverse environmental consequences. These would include continuing to gain access to the property for hunting by foot access, constructing either a temporary ice road or an elevated boardwalk or bridge.

3. The proposed project is not wetland dependent within the meaning of NR 103.08(3)(a), because the activity of creating and maintaining mowed grouse hunting trails is "not of a nature that requires location in or adjacent to surface waters or wetlands to fulfill its basic purpose."

4. There are potential secondary impacts on wetland functional values from the proposed activity within the meaning of NR 103.08(3)(e). These include changes in hydrology in areas proximate to the proposed fill area.

5. The following water quality related functional values or uses of wetlands, within the range of natural variation of the affected wetland have been considered in reaching this determination pursuant to NR 103.03(1):

- (a) Storm and flood water storage and retention and the moderation of water level fluctuation extremes;
- (b) Hydrologic functions including the maintenance of dry season streamflow, the discharge of groundwater to a wetland, the recharge of groundwater from a wetland to another area and the flow of groundwater through a wetland;
- (c) Filtration or storage of sediments, nutrients or toxic substances that would otherwise adversely impact the quality of other waters of the state;
- (d) Shoreline protection against erosion through the dissipation of wave energy and water velocity and anchoring of sediments;
- (e) Habitat for aquatic organisms in the food web including, but not limited to fish, crustaceans, mollusks, insects, annelids, planktonic organisms and the plants and animals upon which these aquatic organisms feed and depend upon for their needs in all life stages;
- (f) Habitat for resident and transient wildlife species, including mammals, birds, reptiles and amphibians for breeding, resting, nesting, escape cover, travel corridors and food; and
- (g) Recreational, cultural, educational, scientific and natural scenic beauty values and uses.

The project proponent has not demonstrated that the proposed fill will not have significant detrimental impacts to these functional values. Rather, as described above, the preponderance of the credible evidence and all of the expert testimony demonstrated that such detrimental impacts were likely to result from the proposed fill.

6. The proposed project has been evaluated under the Wisconsin Environmental Policy Act (WEPA), and it has determined that the grant or denial of the permit would not be a major state action under WEPA.

ORDER

WHEREFORE IT IS HEREBY ORDERED, that the Department's decision to deny the water quality certification be upheld and the petition for review be dismissed.

Dated at Madison, Wisconsin on July 27, 2011.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By _____
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent and shall be served upon the Secretary of the Department either personally or by certified mail at: 101 South Webster Street, P. O. Box 7921, Madison, WI 53707-7921. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.